

**GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS (GACEC)
GENERAL MEMBERSHIP MEETING**

7:00P.M., November 21, 2017

**George V. Massey Station, Second Floor Conference Room
516 West Loockerman Street, Dover, DE**

MINUTES

MEMBERS PRESENT: Dafne Carnright, Al Cavalier, Bill Doolittle, Karen Eller, Ann Fisher, Terri Hancharick, Emmanuel Jenkins, Sonya Lawrence, Karen McGloughlin, Carrie Melchisky, Mary Ann Mieczkowski, Beth Mineo, Bill O'Neill, Robert Overmiller, Jennifer Pulcinella and Laura Waterland.

OTHERS PRESENT: Guests: Lillian McCuen, University of Delaware, Cindy Brown, Department of Education, Barbara Mazza, Department of Education, Betty Torbert and Jennifer Sparks. **Staff present:** Wendy Strauss, Executive Director; Kathie Cherry, Office Manager and Sybil Brown, Administrative Coordinator.

MEMBERS ABSENT: Dana Levy, Howard Shiber, Cathy Cowin, Chris McIntyre, Thomas Keeton, Carma Carpenter, Nancy Cordrey, Lisa Gonzon, and Brenné Shepperson.

Chairperson Dafne Carnright called the meeting to order at 7:08 pm. Dafne asked that committees be mindful of the 7 o'clock start time in the future. Dafne welcomed everyone to the November General Membership meeting. A **motion was made and approved** to accept the November Agenda as submitted.

PUBLIC COMMENT

Lillian McCuen from the University of Delaware provided information about the initiative to increase awareness of assistive technology and its uses in early childhood. The initiative is teaching educators to think about assistive technology in a very different way. It is making sure that everyone is responsible for assistive technology. A workshop will be held on December 12th at the DATI offices. Lillian will send information about that workshop to staff.

Dafne asked for and received a **motion to approve** the October financial report as well as the minutes from the October retreat. The **motion was approved**.

DOE REPORT

Mary Ann reported on activities from the Department of Education including an update on the State Personnel Development Grant, Delaware Early Literacy Initiative and the Delaware Collaborative Community for supporting students who are blind or visually impaired. That report is attached for your reference.

During Mary Ann's discussion on the Delaware Collaborative Community for students who are blind or visually impaired Wendy shared that she sent an email to Mike Jackson, Secretary of the Office of Management and Budget (OMB) requesting that he grant the Division for the Visually Impaired (DVI) a waiver for Orientation and Mobility services since no suitable vendor has been found and without these services there is a violation of the Individuals with Disabilities Education Act (IDEA) standards for students who are blind or visually impaired.

In addition to her report (see attached) Mary Ann spoke about the need for the Delaware Department of Education to file a waiver since the state is over its 1% participation rate for the alternate assessment. According to the regulations, if the state is over 1% participation in any subject of the alternate assessment a waiver must be filed which will include a plan of action. The Department will be submitting a waiver and Mary Ann indicated it would be sent to the GACEC for comment when the public comment period begins. Bill Doolittle indicated that according to his research Delaware is not in the worst shape as there are other states that have worse ratings. Beth Mineo inquired about students who are sent to a program managed by a district other than their home district. Are they are counted in that program's percentage count or the home district's count. Mary Ann indicated that currently they are counted in the program's count.

CHAIR/DIRECTORS REPORT

Dafne shared that she was impressed that during the Department of Education budget hearing at Legislative Hall more than ten speakers gave comments in support of the bill that proposes unit funding for basic special education. Dafne stated that the Transition Conference is coming up on December 5, 2017 and the LIFE conference will once again take place in Dover in January. Wendy shared that at the Legislative Planning meeting it was announced that Brian Hartman will be receiving the Lifetime Achievement Award. Laura prompted Wendy to share that she herself will be receiving the State Service Award. Wendy also shared that she nominated Representative Kim Williams for the Legislative Award and she was chosen. Wendy said she nominated Kim for all of the work she is doing to support individuals with disabilities. Staff attended the GACEC budget meeting. Wendy shared that the issue of the money being taken from the GACEC contractual line budget that was never actually put in our budget has been made clearer to the Office of Management and Budget (OMB) now. The hope is that the funds will be returned to the budget. The Heart 2 Heart Hugs campaign kick-off was held last week at Central

Middle School. Wendy was pleased with the attendance from not only students but Representative Harvey Kenton, Tanner Polce from the Lt. Governor's office as well as Robin Christiansen, Mayor of Dover and Capital School Board representatives. Wendy shared that the musical being created to show the history of disability in Delaware is moving forward and information meetings will be held at Central Middle School in Dover on December 6th and January 10th. The hope is that the musical will be ready to perform by October 2018. Mary Ann suggested that Wendy reach out to Brian Touchette who is a director and writer. Wendy shared the progress of reconvening the IEP task force. The Lt. Governor's office is working on getting legislation ready to reconvene the group to continue the work of the task force. Wendy would like to have the State Transition Task Force for Emerging Adults with Disabilities and Special Health Care Needs reconvened as well. Meetings have been held with Department Secretaries and the Lt. Governors' office and she hopes to have something to share within the next six months. The Legislative Priorities meeting released its final recommendations. Those will be shared with Council.

AD HOC COMMITTEE REPORTS

A question was raised regarding the goal of the GACEC Mental Health Ad Hoc committee. The goal of the committee at this point is to gather information and make sure that it is shared with the many other working committees for mental health. Karen McGloughlin and Dafne both shared that they would be interested in joining the committee. Staff will include them on future correspondence regarding meetings.

COMMITTEE REPORTS

ADULT TRANSITION SERVICES

The Adult Transition Services Committee did not have a speaker this month. In the absence of the chair the meeting was used as a time to discuss upcoming legislation and personnel changes that might impact their population.

CHILDREN AND YOUTH

Bill Doolittle reported that the group held a phone meeting to discuss their upcoming goals and activities. He shared those with Council. The group also met with Barbara Mazza from the Department of Education to discuss the results of the School Satisfaction Survey. The group shared comments and concerns regarding the current survey and its effectiveness and will gather suggestions to share with Barbara in the coming months. Bill shared the committee annual goals

and activities, which will be attached for your reference. Bill **brought a motion** from committee to send a letter to the districts requesting an update on the status of their development of parent councils. The **motion was approved**.

INFANT AND EARLY CHILDHOOD

Chair Ann Fisher reported that the group spoke with guest Lillian McCuen from the University of Delaware regarding assistive technology for early childhood. The group was excited to learn of several initiatives aimed at enhancing the use of assistive technology in early childhood through education and awareness.

POLICY AND LAW

Bill O'Neill presented that this committee interviewed two candidates for the Due Process Layperson Panelist position. The group recommended the appointment of Jennifer Sparks. It did not support recommending Betty Torbert as they felt she would not be a good fit. The committee recommended taking action consistent with the November Policy and Law memo with the addition of comments on item #9, section 2, the definition of relative caregiver as written excludes adult cousins and other extended family. Section 5 of the definition about the caregivers home, states that they must be related as siblings. The concern is this eliminates blended families where there is no blood relation. And finally in #14 section 2.5 clarity is requested as to whether the data will now be reported using text only or if the numerical data, which is thought to be more informative, will also be available.

Commentary on the regulations was as follows:

6. DMMA Proposed Medicaid Excluded Income Regulation [21 DE Reg. 392 (11/1/17)]

The Division of Medicaid & Medical Assistance (DMMA) proposes to adopt a discrete amendment to the Delaware Social Services Manual (DSSM).

As background, the Affordable Care Act (ACA) defines countable income for certain Medicaid populations based on "modified adjusted gross income (MAGI). At 393. In September, 2016 CMS issued guidance as a supplement to a 2013 training manual providing recommended language "that can be used to make the income counting rules more clear for eligibility workers". *Id.* Consistent with the guidance, DMMA is now revising a single regulation to list types of excluded income from the MAGI calculation. At 394. The regulation appears to be relatively straightforward and includes SSI, child support, Worker's Compensation, and TANF in the list of excluded income. There is no State fiscal impact as a result of adoption of the regulation. *Id.*

The Council may wish to consider an endorsement.

7. DMMA Proposed Medicaid Managed Care Reg [21 DE Reg. 389 (11/1/17)]

The Division of Medicaid & Medical Assistance (DMMA) proposes to amend the Delaware Social Services Manual (DSSM) to conform to CMS Medicaid managed care regulations published on May 6, 2016.

The Committee discussed the following observations.

First, in proposed §5305 on p. 391, the citation to 42 CFR 438.208(f)(2) is incorrect. The reference should be to 42 CFR 438.408(f)(2).

Second, it appears that a word and/or punctuation may have been omitted in §3.1.2 on p. 392. It currently reads as follows:

3.1.2 Audited financial statements for the most recent calendar or fiscal year demonstrating, on a consolidated basis, generally accepted accounting principles and generally accepted auditing standards net equity in excess of \$10 million.

The Division could consider the following alternative:

3.1.2 Audited financial statements for the most recent calendar or fiscal year demonstrating, on a consolidated basis, [utilizing] generally accepted accounting principles and generally accepted auditing standards [,] net equity in excess of \$10 million.

Third, DMMA is adopting a piecemeal approach to revising the MCO appeal/fair hearing standards to be effective on January 1, 2018:

DMMA is moving forward with implementation of provisions of the Final Rule effective as of January 1, 2018.

20 DE Reg. at 389.

Effective for services provided on and after January 1, 2018 Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposed to amend the Division of Social Services Manual regarding Medicaid Managed Care Final Rule, specifically to align DMMA Medicaid Managed Care Policy with new Federal Requirements.

20 DE Reg. at 390.

Consistent with CMS regulations, “(s)tates must comply with the [MCO appeal/fair hearing] requirements no later than the rating period for Medicaid managed care contracts starting on or

after July 1, 2017.”

The problem with a “piecemeal” approach is that the federal regulations create an interrelated system. If DMMA only adopts a few standards, and omits others, it will not have an integrated system on January 1, 2018. Moreover, unless DMMA publishes an emergency regulation, it is too late to issue a proposed regulation which would be final on January 1, 2018. For example, proposed §5305 contains the following new subsection:

E. Recipients enrolled in a MCO

A hearing is granted if the request is received within 120 calendar days from the date of the MCO’s notice of an appeal resolution upholding an adverse benefit determination. If the request is not received during the timely notice period, the adverse benefit determination is to take effect.

This ignores the CMS regulation authorizing a beneficiary to appeal an adverse benefit determination without an MCO notice of appeal if the MCO has failed to adhere to notice and timing requirements [42 CFR 438.408(f)(1)].

The regulatory scheme is also unclear on “who” can request a fair hearing. The applicable CMS regulation [42 CFR 438.402] allows states to authorize providers to request a fair hearing with beneficiary consent. Current DHSS standards ostensibly authorize a provider to request an expedited MCO internal hearing/review but are unclear on whether a provider can request a fair hearing. See 16 DE Admin Code 5304.3.

The current DMMA regulation [16 DE Admin Code 5304.3] allows MCOs to conduct internal hearings and issue a decision within 45 days. This conflicts with the applicable CMS regulation [42 CFR 438.408] establishing a maximum 30-day time period for a decision.

The same DMMA regulation [16 DE Admin Code 5304.3] does not differentiate between grievances and appeals. The same CMS regulation [42 CFR 438.408] clearly differentiates between grievances and appeals.

The bottom line is that, on January 1, 2018, the DMMA regulatory scheme will not be uniformly consistent with the CMS standards. This may create confusion among beneficiaries, providers, advocates, and MCOs.

Council may wish to share these observations with the Division.

8. DMMA Proposed Child Care Redetermination Regulation [21 DE Reg. 374 (11/1/17)]

The Department of Health & Social Services maintains a program covering the costs of child care for individuals meeting certain program and financial standards. Eligibility is generally open to the following: 1) TANF beneficiaries who are employed, attending school, or participating in vocational programs; 2) low income working families; 3) low income families

involved with job training or education programs; 4) some Food Supplement program beneficiaries; 5) families receiving DFS protective services; and 6) eligible families with a special needs parent or child. See 16 DE Admin Code §§11002.4 and 11003.7.8. The State “special needs” regulations are attached for facilitated reference.

The Division of Medicaid & Medical Assistance is proposing to amend its regulations to conform to federal regulations published at 81 Fed Reg 67438 (September 30, 2016). Copies of the relevant background section of the regulations (81 Fed Reg 67461-67469) and the current federal regulation (45 CFR 98.21) were attached to the legal memo.

In a nutshell, participants exceeding the normal financial eligibility cap are essentially given an extended, 12-month period of eligibility if their countable income is between 185-200% of the Federal Poverty Level (FPL) but below 85% of the State’s Median Income (SMI). The purpose of the “graduated phase out” is to allow families to transition gradually from receiving subsidized child care rather than facing abrupt termination.

The Division projects a State fiscal impact of \$2 million in FFY18 whose impact is partially offset by \$6 million in federal funds. At 375.

Since the State is required to implement the federal regulation, and the revision benefits program participants (including “special needs” parents and children), Council may wish to consider endorsement.

9. DMMA Proposed Relative Child Care Regulation [21 DE Reg. 376 (11/1/17)]

The Division of Medicaid & Medical Assistance (DMMA) proposes to revise its subsidized child care regulations. The Councils previously commented on related regulations published at 20 DE Reg. 412 (12/1/16) and 20 DE Reg. 614 (2/1/17).

The Division proposes to restrict relative child care to conform to its view of the original intent, i.e., to provide a child care option for parents who work during “non-traditional” hours (e.g. shift work; weekends). Moreover, although relative caregivers may be exempt from licensing, the State is required to implement health and safety standards for all providers. This has prompted DMMA to propose new training and capacity standards. Some of the standards implement the attached 45 CFR 98.41.

The Committee discussed the following observations.

First, there is an ostensible error in Section 5 on p. 378. The first bullet literally allows care in a child’s home only for 4-5 children. The reference to “minimum of four children in the home” should be “minimum of one child in the home”. Compare Section 6.

Second, Section 3 requires a relative provider to be “21 years of age or older”. In contrast, the applicable federal regulation defines relative child care providers as “18 years of age or older”. See 45 CFR 98.2. Moreover, states are restricted in their discretion to add requirements not included in the federal regulations:

(b) Lead agencies may not set health and safety standards and requirements other than those required in paragraph (a) of this section that are inconsistent with the parental choice safeguards in §98.3(f).

45 CFR 98.41(b).

Third, Section 3 includes the following limit: “Relative child care is limited to evening and weekend shift work hours only.” This is ill- conceived given the overall shortage of child care providers. Moreover, “special needs” parents and children are eligible for the State child care program. See 16 DE Admin Code 11003.7.8. It may be extremely difficult for a parent of a special needs child ages 13-18 to identify a licensed provider to add a 13-18 year old to their daycare. Moreover, “special needs” parents often rely on relatives for parenting assistance and federal law requires states to accommodate that reliance. See Joint DOJ/HHS LOF to Mass. Dept. Of Children & Families (1/29/15), published at https://www.ada.gov/ma_docf_lof.pdf. See also U.S. DOJ/HHS Joint Guidance, “Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act (8/15)”, published at https://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf. At a minimum, Section 3 should be revised to allow relative child care for special needs children and adults apart from evening and weekend shifts. It would also be prudent to authorize exceptions for all parents with the approval of DHSS.

Fourth, DMMA is imposing the following requirements on relative providers: 1) completion of orientation class on relative child care rules and regulations; 2) 28 hours of approved training within 12 months; 3) 3 hours of health and safety training annually; and 4) completion of both CPR and first aid courses resulting in certification followed by recertification every 2 years. See Section 4. DMMA is treating relative child care providers as if they were licensed day care providers even though they are exempt from licensing. See 16 DE Admin Code 11004.4.1. Asking a typical grandparent to spend an estimated 40 hours in training to care for a grandchild is “overkill”.

Council may wish to consider sharing these observations with the Division. In the Councils’ discretion, courtesy copies could be shared with UCP; the Arc; Autism DE; Steve Yeatman (DSCY&F & DDC); Rick Kosmalski (DDDS & DDC); Sen. Poore; and Rep. Heffernan.

10. DMMA Proposed Special Need Trust Regulation [21 DE Reg. 387 (11/1/17)]

The Division of Medicaid & Medical Assistance proposes to amend the special needs trusts sections of the Delaware Social Services Manual (DSSM).

Background is provided in the August 2, 2017 CMS guidance. Historically, a parent, grandparent, guardian, or court could establish a special needs trust containing the assets of an individual under age 65 with a disability. To qualify as an exempt asset for purposes of Medicaid, the trust was required to direct repayment of all medical assistance paid by the state on the individual's behalf upon the individual's death.

Section 5007 of the federal CURES Act amended the special needs trust standards to allow a beneficiary to establish such a trust in addition to a parent, grandparent, guardian or court. The new authorization is effective for trusts established on or after December 13, 2016.

DMMA is now amending its regulations to conform to the change in federal law. However, the revision to §20400.9.1 is grammatically incorrect and contains the wrong effective date. The Division should consider the following revision:

~~[For]~~ Special Needs Trusts created on or after December 13, 201~~76~~ by an individual with a disability under age 65 for his or her own benefit can qualify as a special needs trust, conferring the same benefits as a special needs trust set up by a parent, grandparent, legal guardian or court.

Subject to correcting the above section, the Council may wish to consider endorsement since the initiative benefits individuals with disabilities and implements federal law.

11. DMMA Proposed DPBHS Targeted Case Management Regulation [21 DE Reg. 379 (11/1/17)]

The Division of Medicaid & Medical Assistance (DMMA) proposes to amend the Medicaid State Plan to add “targeted case management” as a covered service for DPBHS clients with qualifying mental health or substance abuse profiles.

Qualifying standards for youth are listed on p. 381 and should not be difficult to meet for anyone who meets the eligibility criteria for DPBHS services. Providers could be either DPBHS employees or employees of DPBHS contract agencies. At 383. Qualifications of “targeted case managers” and “highly qualified case managers” include degree, certification, training, and experience requirements. At 383-384. The scope of targeted case management services is very comprehensive and includes assessment, plan of care development and revision, coordination of meetings, referrals, and monitoring. At 382. Although DMMA projects no fiscal impact on

DMMA, the committee suspects the State will “draw down” additional funds since the DPBHS has ostensibly been qualifying for Medicaid subsidies on a limited basis: “Currently, a limited amount of time is reimbursable through the DSCY&F Cost Allocation Plan, this will be discontinued and replaced with Targeted Case Management, at which the funds used to employ staff and contract with providers will be redirected to Targeted Case Management.” At 380.

The Committee discussed the following observations.

First, the upper qualifying age limit is 18 which mirrors the general upper age limit of DPBHS services. See §A.2 on p. 381. However, the DSCY&F has discretion to extend foster care supports to individuals beyond age 18. Some of those covered individuals could have mental health and substance abuse needs being addressed by DPBHS. Therefore, DMMA could consider deleting the age limit and simply leaving in place the “qualifying for DPBHS services” requirement. As a practical matter, this will still generally limit eligibility to persons under age 18 while authorizing Medicaid-funded targeted case management services for a small subset of individuals served by the DSCY&F after age 18.

Second, there is a grammatical error in §D.1 on p. 382. It reads, in pertinent part, as follows:

The Targeted Case Manager will use a child and youth assessment tool designated by the Department or its designee to:

— To the initial assessment and to reassess at a minimum of every 3 months; ...

This makes no sense. The Division may wish to consider the following revision:

The Targeted Case Manager will use a child and youth assessment tool designated by the Department or its designee to:

— To **Prepare** the initial assessment and to reassess at a minimum of every 3 months; ...

Council may wish to consider an endorsement of the initiative subject to consideration of the above revisions. A courtesy copy of comments could be shared with Steve Yeatman (DDC and DSCY&F) and Susan Cycyk (DPBHS Director).

12. DOE Proposed Visual Impairment Eligibility Regulation [21 DE Reg. 372 (11/1/17)]

The Delaware Department of Education proposes to amend its IDEA eligibility standards for visual impairment.

As background, OSEP published the Policy Letter to Kotler, 65 IDELR 21 (11/12/14) a few years ago which supported a broad view of “visual impairment” eligibility under the IDEA. For example, it repudiated language limiting eligibility to “severe” conditions:

(T)he definition of “visual impairment including blindness,” does not contain a vague modifier; rather, any impairment in vision, regardless of severity, is covered, provided that such impairment, even with correction, adversely affects a child’s educational performance.

At 2. In contrast, the Delaware eligibility standard for “visual impairment including blindness” was highly prescriptive and required a disease, condition or impairment of the eye or visual system that seriously affects visual function directly,...”. [emphasis supplied] See 21 DE Reg at 374.

On May 22, 2017 OSEP issued guidance which reiterated and expanded upon the Kotler policy letter. OSEP repudiated state adoption of prescriptive criteria (e.g. “reduced visual field to 50 degrees or less” and encouraged states to conform inconsistent eligibility standards to the federal guidance.

On August 25, 2017 the Delaware DOE issued a policy letter directing districts and charter schools to use the federal regulatory definition of “visual impairment including blindness” pending formal adoption of a revised State regulation. The DOE is now promulgating the revised regulation.

The Committee discussed the following observations.

First, the proposed definition is generally consistent with the federal guidance. However, it would be more informative to include an omitted reference. Compare the following:

Proposed DOE Regulation

6.17.2 This eligibility determination requires a thorough and rigorous evaluation with a data-based media assessment which is based on a range of learning modalities and includes a functional visual assessment.

Federal Guidance

When determining a child’s vision status, the LEA’s evaluation should be thorough and rigorous. Such evaluations should include a data-based media assessment, be based on a range of learning modalities (including auditory, tactile, and visual), and include a functional visual assessment.

The DOE may wish to insert “(including auditory, tactile, and visual)” in the State regulation for clarity.

Second, the DOE should promptly take steps to suspend and correct conflicting provisions in its November 5, 2015 MOU among the DOE, LEAs, charter schools, and DVI. For example, Section V literally states that eligibility to receive services from DVI is limited to students meeting the superseded DOE regulatory definition of “visual impairment including blindness”.

The “assessment” section could also be updated to conform to the new DOE regulation and OSEP guidance. The MOU is an important “working document” which, if not promptly revised, will predictably lead to confusion and violation of the IDEA.

Council may wish to share these observations with the DOE, SBE, and DVI.

13. DOE Proposed Prohibition of Discrimination Regulation [21 DE Reg. 364 (11/1/17)]

The Department of Education (DOE) proposes to repeal its current Prohibition of Discrimination regulation in its entirety and substitute a more detailed version. The DOE review and revision of the regulation was prompted by a July 17, 2017 directive from Governor Carney. At 364. While the new regulation is well intentioned, it is flawed.

The Committee discussed the following observations.

First, the existing regulation bans discrimination “under any program or activity receiving approval or financial assistance from or through the Delaware Department of Education.” [emphasis supplied] The proposed regulation eliminates this protection in favor of a myopic application of the anti-discrimination mandate exclusively to districts and charter schools. Consider the following effect of this approach:

A. The current regulation covers post-secondary institutions and degree granting institutions of higher education which must be “approved” by the DOE. See 14 DE Admin Code 292. The proposed regulation omits higher education institutions.

B. The current regulation covers institutions and programs receiving financial assistance from or through the DOE. This includes a wide variety of entities, ranging from the University of Delaware’s Center for Disabilities Studies to non-profits such as the Parent Information Center. See <https://aimdelaware.org/> See also 14 DE Admin Code 926.19.0 and <http://picofdel.org/services/educational-surrogate-parent-program.html>. Complementary federal law generally bars state educational agencies from providing financial assistance to entities which engage in discrimination. See, e.g., 34 C.F.R. 104.4(b)(v).

C. Department of Education internally approved or funded programs are literally subject to the current regulation. Thus, the Delaware Interscholastic Athletic Association is currently subject to the anti-discrimination mandate. See 14 Del.C. §303(a). The proposed regulation eliminates application of the anti-discrimination mandate to all DOE programs, including the DIAA. Likewise, the proposed regulation abrogates application of the anti-discrimination protection in the DOE’s nonpublic school driver education program. See 14 Del.C. §127. Finally, all DOE scholarship programs would no longer be subject to the anti-discrimination regulation. Compare 14 Del.C. §3460 and 14 DE Admin Code 1200.

The Department should consider retaining the time-honored existing regulation and then including a more detailed supplement covering districts and charter schools.

Second, in the “purposes” section of the proposed regulation, the DOE asserts that it is banning discrimination not simply by entities receiving DOE approval or financial assistance, but any entity receiving “State of Delaware” approval or financial assistance. While this may have a salutary effect, the DOE’s authority to ban discrimination in programs or activities approved or funded by other State agencies is questionable.

Third, the proposed regulation does not adequately address age-based considerations. For example, §6.1 recites as follows:

No Charter School or School District shall make available, sponsor or supervise any Extra-Curricular Activities that restrict student participation on the basis of Protected Characteristic(s).

Thus, a high school age student could demand the right to participate in an elementary school club or intermural team and vice versa. A three year old could apply to attend kindergarten. The DOE may wish to consider whether it intends to authorize such results.

Fourth, §9.0 requires schools to have informal and formal complaint procedures. As a practical matter, discrimination covered by the regulation will also constitute discrimination subject to other complaint resolution systems, including the U.S. DOE OCR complaint system. See <https://www2.ed.gov/about/offices/list/ocr/complaintprocess.html>. See also 14 DE Admin Code 258, 34 CFR 104.36, and 6 Del.C. Ch. 45. If schools solely provide notice of the complaint system in the regulation, families could easily be misled into believing this is their sole avenue of redress and miss a deadline. Moreover, 14 DE Admin Code 258 establishes a competing complaint system within public schools. For example, an LEP student may be aggrieved by a lack of language-based accommodations which could be the basis of a complaint under both the proposed regulation and DOE federal program complaint regulation (14 DE Admin Code 258.3.0). If the public school only provides a “Formal Student Complaint form” described in the proposed regulation, without notice of other complaint systems, this may be inherently misleading. The school would be directing the student to a less efficacious system since, in contrast to the DOE’s federal program complaint procedure, it lacks an explicit right to appeal to the DOE and does not include a DOE investigation. The proposed regulation should include a “notice” provision identifying other grievance systems.

Fifth, the proposed regulation is silent on a student’s right to appeal a district decision to the DOE. It’s unclear if 14 Del.C. §1058 could be invoked to solicit State Board of Education review.

Sixth, in §9.1.2.3.2, the DOE should consider substituting “specify” for “specifies”.

Seventh, in §11.0, first sentence, the DOE should consider substituting “at the beginning” or “by the beginning” for “for the beginning”.

Eighth, in §12.0, the DOE should correct the reference to the “Individuals with Disabilities Education Act”.

Council may wish to consider sharing these observations with the DOE, SBE, and Attorney General.

14. DOE Proposed Accountability Regulation [21 DE Reg. 363 (11/1/17)]

The Department of Education is publishing a regulation comprehensively revamping its public school accountability regulations to align with its approved ESSA Plan. At 363. Given the length of the ESSA Plan (145 pages) and proposed regulation (15 pages), I have only had time to conduct a cursory review of the regulatory initiative.

The committee discussed the following observations.

First, overall, the regulatory scheme appears more “forgiving” than its predecessor. For example, “sanctions” are no longer contemplated. See proposed §1.1 and current §7.0. Language is also more euphemistic. For example, a parent would understand that a school characterized as a “Persistently Low Achieving School” is a school with chronic low performance. See, e.g., current §8.0. In contrast, the new “lowest” status is “Comprehensive Support and Improvement - Re-identified”. Such a school has demonstrated chronically poor performance for at least six (6) years. See proposed §§7.1 and 7.2. The term is highly uninformative and could aptly be characterized as mumbo jumbo.

Second, proposed §2.4 cross references 14 DE Admin Code 101.9.0. That regulation has been “suspended” since FY08. The DOE may wish to revise the reference.

Third, the availability of disaggregated data is a valuable resource in “drilling down” to the source of performance deficits or high achievement. For example, one grade or one classroom in a school may be an outlier with either impressive performance or poor performance when compared to the school as a whole. Unfortunately, proposed §2.5 authorizes reporting only by whole schools and districts. Although §§ 2.62 and 2.6.3 refer to subgroup data, these sections do not literally authorize reporting of disaggregated data below the level of a school. It would be preferable to authorize reporting of data which is less “blunt” than composites of entire schools and districts.

Fourth, there is an error in proposed §2.6. The term “AYP” should include a strikeout - “~~AYP~~”.

Fifth, proposed §4.3 should be reconsidered. It states as follows:

- 4.3. For accountability purposes, a student with a special exemption, as defined in 14 DE Admin Code 101, shall not be included in accountability calculations.

In contrast, 14 DE Admin Code 101 contains no “definition” of “special exemption” while directing the opposite result:

- 12.2.3.2. Students who are granted a special exemption shall be counted in the school

participation rate for school and district accountability pursuant to 14 DE Admin Code 103.2.4.

There is also some “tension” between §4.3 (directing that exempt student results not be included in accountability calculations) and 14 Del.C. §1511.(j): “Students who are granted portfolio assessment under this subsection shall be included in the participation rate calculation for schools and school districts.”

Council may wish to share these observations with the DOE and SBE.

15. Department of Insurance Proposed Health Insurance Arbitration Reg. [21 DE Reg. 406 (11/1/17)]

GACEC commented on an earlier version of this proposed regulation in September, 2017. The Department of Insurance is now publishing a revised proposed regulation incorporating some amendments prompted by the Councils’ commentary.

First, Council recommended that the Department of Justice not be limited to attorneys when providing assistance to persons appealing adverse health insurer substance abuse decisions. The Department agreed and revised the authorization to cover all forms of assistance (not merely legal assistance) and allow non-attorney assistance. At 407.

Second, Council recommended revising §2.0 to include “the DOJ website address (with description of its substance abuse legal assistance program) in addition to a phone number”. The Department agreed and added website and email addresses. Id.

Third, Council recommended incorporation of disclosure of the availability of DOJ assistance in notices required by the regulation. The Department compromised by incorporating disclosure in notices issued under the complementary regulation published at 21 DE Reg. 400 (11/1/17). Id.

Finally, the Department acknowledged the Councils endorsement of the original proposed regulation subject to considering the above amendments. Since the Department has improved the initiative consistent with the Councils earlier commentary, Council may wish to reiterate their endorsement without recommending any further changes.

16. Department of Insurance Proposed Health Insurance Claim Review Reg. [21 DE Reg. 400 (11/1/17)]

GACEC commented on an earlier version of this proposed regulation in September, 2017. A copy of the September 28, 2017 SCPD memorandum is attached for facilitated reference. The Department of Insurance is now publishing a revised proposed regulation incorporating some amendments prompted by the Councils’ commentary.

First, Council recommended that the Department of Justice not be limited to attorneys when providing assistance to persons appealing adverse health insurer substance abuse decisions. The Department agreed and revised the authorization to cover all forms of assistance (not merely legal assistance) and

allow non-attorney assistance. At 401.

Second, Council recommended revising §2.0 to include “the DOJ website address (with description of its substance abuse legal assistance program) in addition to a phone number”. The Department agreed and added website and email addresses to multiple sections. Id.

Third, Council noted that the notice of availability of DOJ assistance was “buried in the boilerplate”. The Council recommended revisions to make the notice more prominent. The Department agreed and revised formatting and wording. Id.

Fourth, Council observed that the notice only disclosed the availability of DOJ assistance with mediation while omitting references in other review process regulatory sections. The Department agreed that DOJ assistance was not limited to mediation and added some conforming revisions. Id.

Fifth, Council observed that the notice in §4.0 could be misleading since it suggested that DOJ help would only be available if “you are approaching the deadline for filing your appeal”. The Department omitted this language in the revised proposed regulation. Id.

Sixth, Council recommended revision of notices to highlight that DOJ assistance was “free”. The Department observed that the enabling law is silent in this context and declined to add a reference clarifying that assistance is “free”.

Finally, the Department acknowledged the Councils endorsement of the original proposed regulation subject to considering the above amendments. Since the Department has significantly improved the initiative consistent with the Councils earlier commentary, the Council may wish to reiterate their endorsement without recommending any further changes.

MEMBERSHIP COMMITTEE

There was no report at this time.

PERSONNEL COMMITTEE

There was no report at this time.

OUTSIDE COMMITTEE UPDATES

Robert shared that the meetings for the school consolidation work continue, though less productive than in the past. He shared that in his opinion there would likely not be movement on this issue due to the concerns of some of the groups.

FINAL REPORT FROM THE CHAIR

Dafne reminded members that responses to letters could be found at the back of the room. Also she gave a reminder to committee chairs that they are to turn in their committee meeting reports prior to leaving for the night. A **motion was made to adjourn** the meeting. The **motion was approved** and the meeting was adjourned at **8:49 p.m.** There will be no meeting in December.